

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

THE WASHINGTON COMPANY, PETITIONER

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHIRT FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-435

F.W. WOOLWORTH COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is reported at 530 F. 2d 1245. The Board's decision and order (Pet. App. 6a-23a)¹ are reported at 216 NLRB 945.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1976 (Pet. App. 1a-2a.) The petition for a writ of certiorari was filed on September 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹The appendix to the petition contains the Recommended Decision and Order of the Administrative Law Judge. The Board's Decision, adopting the decision of the Law Judge but modifying the recommended order, is not reprinted. It is contained in the appendix to the briefs in the court of appeals (herein "A."), a copy of which has been lodged with this Court.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company violated Section 8(a)(1) of the National Labor Relations Act by confiscating union literature and authorization cards distributed at employee work stations before working hours, not because of legitimate business considerations, but in an effort to discourage union activities.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et. seq.*), are set forth at Pet. App. 24a.

STATEMENT

In furtherance of an organizing campaign among the employees of petitioner Company's central accounting office, some of those employees, on behalf of the Union,² made five distributions of union literature prior to working hours; the literature was placed on the desks or work stations of all non-supervisory employees (Pet. App. 10a-12a). The Company did not interfere with the first and second distributions (Pet. App. 10a-11a). Indeed, it distributed a response thereto, which was given to the employees at their work stations during working time (Pet. App. 11a).

The third piece of union literature had a union authorization card and a prepaid envelope attached. This material was removed from unattended desks and work stations by Company supervisors (Pet. App. 11a). Supervisor Anderson remarked "that it was lucky he got there before the employees and that he would fix the union by mailing the authorization cards back to the union so that [it would] have to

²Office and Professional Employees International Union, Local No. 9, AFL-CIO.

pay for them" (*ibid.*). Thereafter, the Union received, at a cost of \$12.60, 126 unsigned authorization cards, which had been mailed by the Company in the prepaid envelopes (*ibid.*).

The fourth piece of union literature, which also contained an authorization card and a prepaid envelope, was similarly removed (Pet. App. 11a-12a). While picking up this material, Supervisor Anderson stated that he was interested only in the cards (Pet. App. 12a). Thereafter, the Union received, at a cost of \$15, 150 unsigned authorization cards, which had been mailed by the Company in the prepaid envelopes; the Union refused delivery of another 21 cards which had been sent special delivery (*ibid.*).³

At no time during the period in question did the Company issue any written or verbal instructions to unit employees regarding littering or security problems resulting from the distribution of the union literature (*ibid.*). The Company itself distributes to all unit employees, at their desks and work stations, literature regarding sports activities it sponsors and certain sales of merchandise in its store (Pet. App. 12a-13a).

The Board found that the Company's confiscation of the union materials interfered with the employees' right to solicit support for the Union, in violation of Section 8(a)(1) of the Act (Pet. App. 19a). In so holding, the Board found no legitimate business justification for the Company's action, but concluded that its purpose was to discourage union activities. The Board noted (Pet. App. 16a-17a):

[The Company's] responses [to the union literature] did not direct the employees to discontinue or change their method of distribution. No complaint

³ Company officials later removed from unattended desks and work stations union literature from a fifth distribution (Pet. App. 12a).

about such distribution was made to the employees by any * * * company official. There was apparently no company rule forbidding such distribution. The Respondent from time to time distributed non-work literature and pamphlets to the unit employees at their work stations. There is no showing that the employees' distribution created a littering problem or safety hazard, nor that the Respondent removed these materials to avoid interference with the employees' performance of their duties. The contrary is indicated by the fact that the Respondent on several occasions permitted literature that had been distributed to remain on the desks or work stations, and was concerned, as a supervisor stated, primarily with the authorization cards attached to some of the leaflets.

* * * The Respondent has presented no evidence that its confiscation of Union materials was pursuant to a valid rule, necessary to maintain cleanliness, order, discipline, safety, or production at its central accounting office, or warranted under special circumstances such as have been held to apply to selling areas of stores. The record in fact indicates that the Respondent was concerned not so much with the distribution of the Union literature as with the availability of the authorization cards for the consideration of the unit employees.

The Board ordered the Company to cease interfering with distribution of union literature "in order to discourage membership in and activities on behalf of [the Union]" (Pet. App. 22a), and further ordered the Company to reimburse the Union for the postage costs incurred by the Company's mailing of the blank cards (A. 26-27).

The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order. The court stated (Pet. App. 5a):

The record in the present case adequately supports the Board's finding that the employer's objective was not the protection of its property interests as in *Patio Foods* [v. *National Labor Relations Board*, 415 F. 2d 1001 (C.A. 5)] but rather to discourage union activity.

* * *

ARGUMENT

Contrary to petitioner's contention (Pet. 2), this case does not involve the issue of an employer's right to prohibit distribution of literature in a work area "in order to prevent disruption and litter in the area."⁴ The Board, upheld by the court of appeals, specifically found that the Company was not so motivated in removing the union literature. Nor did the Board "use [Supervisor Anderson's] * * * statement as a total predicate for the finding of unlawful interference" (Pet. 7). Rather, as shown above (pp. 3-4), the Board relied on the totality of the circumstances in finding that the Company was motivated by anti-union considerations.⁵

⁴An employer may lawfully restrict distribution of all literature in working areas so long as he is motivated by legitimate business purposes, and does not discriminatorily ban only the distribution of union literature. See, e.g., *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 803, n. 10; *Time-O-Matic, Inc. v. National Labor Relations Board*, 264 F. 2d 96, 100 (C.A. 7); *Commercial Controls Corp. v. National Labor Relations Board*, 258 F. 2d 102, 103 (C.A. 2); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 618, 621 n. 8.

⁵Petitioner's contention that Section 8(c) of the Act, 29 U.S.C. 158 (c), prevented the Board from considering Supervisor Anderson's statements in its examination of the Company's motivation for removing the literature was not raised before the Board in petitioner's exceptions to the recommended decision of the Administrative Law Judge;

The only question actually presented on this record, therefore, is whether the Board's findings, which were upheld by the court of appeals, are supported by substantial evidence. Such an issue does not warrant review by this Court. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491. Moreover, as shown above, the record evidence amply supports the Board's finding that the Company's motive in confiscating the Union's literature was to inhibit its employees' organizational activity.

Section 10(e) of the Act, 29 U.S.C. 160(e), therefore, precludes consideration of that contention by the reviewing court. *National Labor Relations Board v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322; *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37; *Marshall Field & Co. v. National Labor Relations Board*, 318 U.S. 253, 255-256; *Puerto Rico Drydock & Marine Terminals, Inc. v. National Labor Relations Board*, 284 F. 2d 212, 215-216 (C.A.D.C.), certiorari denied, 364 U.S. 883. In any event, the contention is without merit. Supervisor Anderson's statements were not "views, argument, or opinion," but rather factual admissions which were clearly admissible to establish the Company's discriminatory motive for confiscating the union literature. See *Darlington Mfg. Co. v. National Labor Relations Board*, 397 F. 2d 760, 768-769 (C.A. 4) (*en banc*).

Relying on *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, petitioner also contends (Pet. 14-15) that the Company's discriminatory motive is irrelevant to the lawfulness of the confiscation. The Court in *Darlington*, however, held that an employer's discriminatory motive was irrelevant in the unusual context of a decision to terminate his entire business operations. *Id.* at 272-274. The Court explicitly recognized, however, that an employer's discriminatory motive is relevant in determining the lawfulness of less sweeping action. *Id.* at 274-277.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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